No. 08-1292

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In The
Supreme Court of the United States

LUIS ACOSTA,

Petitioner,

v.

CITY OF PHOENIX,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Whether the Ninth Circuit Court of Appeals correctly dismissed the Petitioner's Title VII Claim relating to his transfer to Salt River Service Center because he failed, in his charge of discrimination filed with the Equal Employment Opportunity Commission, to timely submit his charge and thus failed to exhaust his administrative remedies.

Whether the Ninth Circuit Court of Appeals correctly dismissed the Petitioner's claim of Title VII retaliation arising out of the Petitioner's transfer to the Metro Facilities Division because he failed to adduce evidence demonstrating any adverse employment action and therefore, failed to establish a *prima facie* case of discrimination or retaliation consistent with Title VII.

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STATEMENT OF THE CASE

The Statement of the Case presented by Petitioner Luis Acosta ("Petitioner") does not accurately describe the proceedings below. Also, it is filled with a myriad of purported facts and references to evidence not presented in the District Court nor considered by the Ninth Circuit Court of Appeals.

A. Proceedings.

Petitioner filed this action on June 16, 2005 in the United States District Court for the District of Arizona. On August 18, 2005, the City of Phoenix ("City") filed its Answer. Thereafter, the parties exchanged disclosures, engaged in discovery and participated in an unsuccessful settlement conference. On August 31, 2006, the City moved for Summary Judgment and filed a Separate Statement of Facts. The City argued that Petitioner's Title VII claims of retaliation and discrimination on the basis of national origin were time-barred for failure to file a timely charge with the EEOC. The City also argued that Petitioner was neither the subject of discrimination on the basis of his national origin nor the victim of retaliation as Petitioner failed to proffer facts supportive of a *prima facie* case to establish that the Petitioner was discriminated or retaliated against due to his national origin. The facts proffered established that Petitioner was transferred from one work location to another based on complaints about his behavior from numerous co-workers, many of

whom were Hispanic males just like the Petitioner. Relative to a later transfer alleged by the Petitioner as constituting improper discrimination and/or retaliation, the City proffered evidence (not disputed) that the transfer was based on the Petitioner's desire for additional experience and because of a need due to a vacancy. Also, the transfer was embraced by the Petitioner, facts that the Petitioner did not dispute.

On October 5, 2006, Petitioner filed his Response to the City's dispositive motion and a Separate Statement of Facts. The Petitioner's Statement of Facts referenced inadmissible, irrelevant and undisclosed evidence, not to mention unsupported "facts". On November 3, 2006, the City filed its Reply in Support of Its Motion for Summary Judgment. The City also filed a Response to the Plaintiff's Statement of Facts, noting and objecting to the inadmissible, irrelevant and undisclosed evidence referenced in Petitioner's Statement of Facts. Petitioner did not ever contest or proffer objections to the City's Statement of Facts that supported the City's Motion for Summary Judgment nor did the Petitioner file a Response to the City's Response to the Plaintiff's Statement of Facts noting the various objections based on inadmissibility, irrelevance and non-disclosure. Petitioner was represented by attorney Robert Gregory throughout the lower court proceedings. The City requested oral argument upon filing its Motion for Summary Judgment, Petitioner did not request oral argument. On December 4, 2006, the trial court, without oral argument,

granted summary judgment in favor of the City on all of the Petitioner's claims. The trial court stated:

> [B]ecause there is no dispute of material fact concerning the dates at issue, Acosta's [Petitioner's] claims are time-barred by 42 U.S.C. §2000(e)-5(e)(1). Summary Judgment will be granted.

(Petition Appendix 20)

The trial court further analyzed the Petitioner's claim as if Petitioner "hypothetically filed his charge of discrimination with the EEOC in a timely fashion. . . ." (Petition Appendix 20). After engaging in such analysis, the trial court determined neither discrimination on the basis of national origin (Petition Appendix 23-25) nor Title VII retaliation (Petition Appendix 27, 28), had been established, or was actionable.

On December 5, 2006, final judgment dismissing the action was entered in favor of the City. On December 22, 2006, Petitioner filed a Motion for Extension of Time to File Appeal with the Ninth Circuit Court of Appeals and on December 26, 2006, an Order was entered granting the motion for extension of time to file appeal, permitting Petitioner through January 29, 2007 by which to file a Notice of Appeal. On January 26, 2007, Petitioner, acting pro per, timely filed a Notice of Appeal. By Memorandum Decision issued October 16, 2008, the Ninth Circuit Court of Appeals affirmed the judgment of dismissal. On the Petitioner's claim of discrimination and retaliation

relating to his transfer to the Salt River Service Center (the first transfer), the Ninth Circuit Court of Appeals held: "[t]he District Court properly granted summary judgment . . . because he failed to make any reference to that transfer in his Equal Opportunity Employment Commission ("EEOC") charge of discrimination." (Petition Appendix 2). On the Petitioner's discrimination and retaliation claims relating to his later transfer to the Metro Facilities Division and work station assignments, the Ninth Circuit Court of Appeals held: "[t]he District Court properly granted summary judgment . . . because he failed to demonstrate an adverse employment action and therefore failed to make a prima facie case of discrimination or retaliation." (Petition Appendix 2). On January 15, 2009, Petitioner's Petition for Rehearing en Banc and Petitioner's Motion to Stop Continuing Discrimination were denied.

B. Facts.

The following were the undisputed facts presented to the District Court and which were considered by the Ninth Circuit Court of Appeals:

Beginning in December, 1991, Petitioner was employed by the City as a trades helper in the Public Works Department. In April, 2002, the Petitioner filed a grievance with the City concerning his transfer/ reassignment from the Skunk Creek Landfill to the Salt River Service Center. The grievance alleged that the transfer was a result of harassment, but failed to

identify any protective basis or the specific form of harassment. Following an investigation, the City's Equal Opportunity Department determined that Petitioner was reassigned/transferred due to his co-workers' complaints and that some of the co-workers who complained were members of the same protected group as was Petitioner. Finding no discrimination, or reasonable inference of discrimination, the grievance was denied and the investigation ceased.

On August 2, 2004, the Petitioner was transferred to the Metro Facilities Division from the Salt River Service Center for a temporary assignment. The decision to transfer the Petitioner was twofold, an employee of the Metro Facilities Division had gone on long term disability, and, the Petitioner had expressed a desire to work closely with skilled trade personnel and such personnel worked at the Metro Facilities Division. The Petitioner was assigned a job to change air filters throughout city buildings, requiring him to be in the field almost one hundred percent of the time. The Metro Facilities building structure included an air conditioned administrative wing, an HVAC shop, a warehouse and a building maintenance workers shop. The Petitioner was given a desk in the warehouse where he could complete necessary paperwork, the same location where the Petitioner would need to obtain his filters on a daily basis to complete his field work. Soon after the transfer, the Petitioner raised concerns about the location of his desk, believing that it should not be in the warehouse that was swamp cooled, but rather, in

the administrative office that was air conditioned. One day after so complaining, the Petitioner was moved to the administrative office area.

On March 11, 2005, Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination on the basis of national origin and retaliation. On March 31, 2005, a dismissal and notice of rights (right to sue letter) was issued by the EEOC. On June 15, 2005, the Petitioner timely filed his Complaint in the United States District Court for the District of Arizona.

REASONS FOR DENYING THE PETITION

The Petition for Certiorari ("Petition") should be denied. No compelling reason exists for this Court to grant Certiorari in this case. The Petitioner fails to demonstrate any conflict with the holdings of other Circuit Courts or this Court relative to the issues. The Ninth Circuit Court of Appeals correctly referenced and applied the statutory provisions relating to the timely filing of Title VII charges of discrimination and retaliation claims with the EEOC. On appeal to the Ninth Circuit Court of Appeals, Petitioner attempted to raise new arguments and reference new evidence not presented to the District Court, both of which were properly ignored by the Ninth Circuit Court of Appeals. Petitioner improperly continues in his

Petition to advance new arguments and reference new evidence that were not part of the proceedings in the lower court.

I. Petitioner Offers No Compelling Reason For The Grant Of Certiorari Regarding The Dismissal Of His Title VII Claims.

In the Petition, Petitioner posits four issues, none of which involve the issues before the trial court, let alone any issues before the Ninth Circuit Court of Appeals. The first "question presented" by Petitioner is whether the "EEOC complaint proceedings proved a ruse, depriving them and court proceedings based upon them, of all legitimacy." This question, together with the other three questions or issues presented for review, provide the only ruse before this Court. Somewhere underneath (1) the four questions presented, (2) the Statement of the Case that mistakes or manufactures facts, and (3) the proffered reasons for granting the Petition, is the only true issue before this Court – whether the Ninth Circuit Court of Appeals properly analyzed/determined the appropriateness of summary judgment relief in favor of the City on the Petitioner's Title VII allegations of discrimination and/or retaliation. The Ninth Circuit Court of Appeals, and the District Court before it, correctly analyzed the law, and the evidence properly before it, concluding that Petitioner failed to timely file the charge of discrimination/retaliation and, even assuming, hypothetically, such a charge was timely filed, the City's actions were for legitimate nondiscriminatory reasons

pertaining to the Petitioner's discrimination allegations and, any retaliation claim sought pursuant to Title VII was unavailable when the Petitioners claim arose out of, at best, whistleblower allegations.

A Title VII claimant must timely pursue an administrative remedy with the EEOC before he can file suit. In particular, the claim must be filed with the EEOC "within 180 days after the alleged unlawful employment practice occurred." 42 U.S.C. §2000e-5(e)(1) (Petition Appendix 15). The time is increased from 180 days to 300 days if the claimant asserting the claim instituted proceedings with a state or local agency first, assuming the state has a fair employment practice law that is entitled to take action and the agency is an appropriately listed state employment practice agency pursuant to 29 C.F.R. §1601.74(a). (Petition Appendix 17). The District Court, being presented with no Complaint filed with the Arizona Civil Rights Division, the only agency having a "FEP agency" designation pursuant to 29 C.F.R. §1601.74(a) within 180 days, applied the facts of this case to the law on timeliness properly, to which the Ninth Circuit Court of Appeals reviewed and affirmed. On March 11, 2005, more than 180 days after his transfer to the Metro Facilities Division on August 2, 2004, Petitioner filed a charge of discrimination with the EEOC alleging Title VII national origin discrimination and retaliation. No evidence was presented that a similar charge was timely filed with an appropriate "FEP agency".

No good, let alone compelling reason exists to grant certiorari relating to the dismissal of the Petitioner's Complaint due to the untimely filing with the EEOC. The District Court and the Ninth Circuit Court of Appeals properly analyzed the issue of timeliness of the EEOC filing. Based upon the uncontradicted evidence before the District Court, the Ninth Circuit properly determined that the EEOC filing was untimely, thereby barring the Petitioner's discrimination and retaliation claim relating to his transfer to the Salt River Service Center. Nor was there any error relative to the Ninth Circuit Court of Appeals affirming summary judgment relief on the Petitioner's discrimination and retaliation claim relating to his transfer from the Salt River Service Center to the Metro Facilities Division and his work station assignment. As noted by the District Court and the Ninth Circuit Court of Appeals, in order to establish a *prima facie* case of discrimination or retaliation, it was incumbent upon the Petitioner to demonstrate an adverse employment action. *Pearson v. Hewlett-Packard Company*, 358 F.3d 599, 603 (9th Cir. 2004); *Porter v. California Department of Corrections*, 419 F.3d 885, 894 (9th Cir. 2005). (Petition Appendix 2). The record before the District Court, and thus, the record before the Ninth Circuit Court of Appeals, was devoid of any fact establishing, let alone suggesting, adverse employment action. Also, the Ninth Circuit Court of Appeals decision was not predicated on law or cases in conflict with other Circuit Courts or decisions from this Court.

II. Petitioner Raises For The First Time A New Argument, The EEOC Complaint Proceedings Proved A Ruse Thus Supporting Its Petition.

The Petitioner posits, as his first question why the Petition should be granted, a conclusory statement that the EEOC complaint process was a ruse. This issue was not presented to the District Court, no evidence was presented to the District Court to establish such a "conclusion", and, the question is not worthy of presentation before this Court. This Court cannot hear Petitioner's argument presented for the first time in the Petition relative to any conclusory statement that the EEOC complaint process was a ruse.

Also, the Petitioner offers no compelling reason for a grant of Certiorari by this Court relative to this conclusory issue, whether that be a conflict of other decisions from this Court or other Circuit Courts wherein such an issue has been presented, let alone compelling reason to grant Certiorari relative to this question.

III. Petitioner's Question Number Two, Whether A "Disparate Treatment Test Is Even Possible In A Segregation Case" Is A New Argument And Should Not Be Accepted For The First Time In The Petition.

Petitioner asserts, as his second question why the Petition should be granted, whether a disparate

treatment test is possible in a segregation case. In addition to confusing labels and terminology, this argument was never raised in the District Court or before the Ninth Circuit Court of Appeals. This Court should not hear a Petitioner's argument presented for the first time in the Petition. Moreover, Petitioner's argument philosophically requests that the Court reflect on this question never presented to the District Court or the Ninth Circuit Court of Appeals, cites to no conflict with other decisions from this Court or other Circuit Courts in which this question has been reflected upon, let alone decided on the merits, and should not form a basis here as a compelling reason to grant Certiorari by this Court.

IV. Petitioner's Third Question For Granting This Petition, "Whether Title VII Retaliation Is Often A Form Of Discrimination Itself", Again Is A New Argument And It Should Not Form The Basis For Relief.

Petitioner asserts, as the third question supportive of the Petition's grant, the issue of whether Title VII retaliation is a form of discrimination itself. This third question posited by Petitioner is no different than the first two questions, all three being philosophical inquiries, neither advanced by the Petitioner before the District Court, whether advanced as a philosophical inquiry or legal basis for relief, nor advanced philosophically or legally before the Ninth Circuit Court of Appeals. Moreover, such philosophical inquiry has not, as evidenced in the

Petition for Review, been identified as forming any conflict with other decisions from this Court or other Circuit Courts that have addressed this philosophical inquiry. Indeed, the inquiry is based on "fact" not presented to the District Court or the Ninth Circuit Court of Appeals, that is, the Petitioner's intelligence in the work place and the City not respecting that intelligence due to the Petitioner's national origin. Because no factual predicate exists in the record before this Court, nor was this issue brought before the District Court or the Ninth Circuit Court of Appeals, and in the absence of a compelling reason or conflict in the Circuits, this question presents no reason for a grant of Certiorari by this Court.

V. The Petitioner's Last Question Presented To Support The Granting Of His Petition Reveals, More Than The First Three Questions, The Preposterousness Of The Petition - Whether Phoenix Employees Are A Priceless Resource In A Time Of Economic Adversity.

Petitioner asserts, as his last question that supports the granting of this Petition, whether City employees are priceless resources in times of economic adversity. This question, perhaps more than the first three, borders on frivolity and is certainly not reflective of the respectful process and procedures in filing a Petition for Writ of Certiorari. The Petitioner's suggestion that Phoenix employees are a priceless

resource in a time of economic adversity is philosophical attorney rhetoric not presented to the District Court or the Ninth Circuit Court of Appeals, is certainly not a legal question or a question supported by any facts before this Court, and makes a mockery of the Petition, this Court's time and resources, not to mention the City and its time and resources. Certainly, Title VII and whether the City treated the Petitioner properly in 2004 and 2005 should not be gauged relative to economic circumstances of any kind, let alone economic circumstances in 2009. Nor has the Petitioner provided this Court with any authority suggesting such inquiry as an appropriate inquiry or as a compelling reason, when such questions or facts were not introduced at the District Court or Ninth Circuit Court of Appeals. Rather, suggesting such a question as worthy of a reason to grant a Petition, is only reflective of the lack of any meritorious basis to submit the Petition for Review in the first place.

There is no reason, good, compelling or otherwise, to grant Certiorari here as the proposed questions set forth by the Petitioner are neither supported by the record or the law. The issues presented by the Petition were not even raised before the Ninth Circuit Court of Appeals. Under the circumstances of this case, there was nothing improper in the Ninth Circuit Court of Appeals' decision.

CONCLUSION

The Petition for Certiorari should be denied. There is no compelling reason demonstrated for this Court to exercise its discretion to review the Memorandum Decision of the Ninth Circuit Court of Appeals in this case.

Respectfully submitted,

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